

Richard Martin
453 4500

EXHIBIT 4 BUH
DATE 2-13-09
HB 452

Norman L. Newhall
LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.
300 4th Street North
P.O. Box 2629
Great Falls, Montana 59403
Telephone: (406) 453-4500
Attorneys for Petitioners

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

LEE N. THOMPSON, DARIN SHARP,
and SCOTT BAILEY,

Petitioners,

-vs-

STATE OF MONTANA,

Respondent.

LIBERTY NORTHWEST INSURANCE
CORPORATION and MONTANA STATE FUND)

Intervenors.

WCC NO. 2004-1089

AFFIDAVIT OF ATTORNEY NORMAN L. NEWHALL

STATE OF MONTANA)
: ss
County of Cascade)

Norman L. Newhall, upon being duly sworn, on oath deposes and says:

1. I am an attorney in good standing, licensed to practice in state and federal courts in Montana, and actively practicing law in Great Falls, Montana. My practice

regularly includes representation of workers' compensation clients in adjusting their claims with workers' compensation insurers and, when necessary, advocating their claims before the workers' compensation court.

2. In 2004, I have represented Plaintiff Scott Bailey with respect to a workers' compensation claim. The workers' compensation insurer was the Montana State Fund. During the last full week of March 2004, I received an unsolicited call from Scott's treating physician, Dr. J. W. Bloemendaal. Dr. Bloemendaal indicated that he had just been talking with Scott's adjuster regarding a surveillance videotape which had been taken of Scott. The tape had not been provided to the undersigned. Dr. Bloemendaal indicated that based upon his conversation with the adjuster and his review of the tape, he was inclined to place Scott at maximum medical improvement; find no impairment; and return Scott to his time of injury job. Neither Scott nor I had authorized the adjuster or Dr. Bloemendaal to converse regarding Scott's medical condition. At my request, Dr. Bloemendaal agreed to send me the tape for my review and I persuaded him to delay his report until after my review. After reviewing the tape, I provided Dr. Bloemendaal and the adjuster with my comments regarding the tape. As a result, the insurer agreed to refer Scott for a second opinion by another physician selected by the insurer. The physician selected by the insurer determined that Scott had a 25% whole person impairment and had permanent restrictions which would likely prevent him from returning to heavy work.

3. In the pretrial conference relating to this matter, it was mutually stipulated and agreed between the undersigned and Larry W. Jones, esq., attorney for Liberty Northwest Insurance Corporation, that Liberty would stipulate to the fact that it has ex parte communications with healthcare providers pursuant to §39-71-604(3) and §50-16-527(5) MCA. A true and correct copy of Liberty's stipulation to this effect is annexed hereto as Exhibit 9.

4. In my experience, since the passage of the revisions to §39-71-604 in 2003, representatives of workers' compensation insurers routinely converse with healthcare providers concerning medical care and treatment of workers' compensation claimants without prior notice to or participation from claimants or their attorneys.

5. According to the most recent statistics published by the Employment Relations Division of the Montana Department of Labor and Industry in the Workers' Compensation 2003 Annual Report there were 29,853 workers' compensation claims filed in fiscal year 2003. In fiscal year 2003 the total of all workers' compensation benefits paid was \$200,537,680 and the total medical benefits paid in said fiscal year was \$109,065,439.

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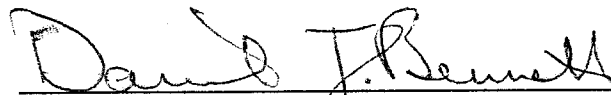
Further Affiant sayeth not.

DATED this 15th day of October, 2004.


Norman L. Newhall

SUBSCRIBED and SWORN to before me this 15th day of October, 2004, by
Norman L. Newhall.

(Notary Seal)


Print: DANIEL J. BENNETT
Notary Public for the State of Montana
Residing at Great Falls, Montana
My commission expires 6-27-2004

CERTIFICATE OF MAILING


I certify under penalty of perjury that the foregoing was duly served upon the respective parties entitled to service by depositing a copy in the U.S. mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Mike McGrath
Montana Attorney General
Brian M. Morris, Solicitor
P. O. Box 201401
Helena, MT 59620-1401

David Hawkins
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759

Larry W. Jones
Law Office of Jones & Garber
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489

DATED this 15th day of October, 2004.



For Linnell, Newhall, Martin & Schulke

MI 532

LAW OFFICE OF JONES & GARBER

An Insurance Company Law Division

700 SW HIGGINS AVENUE, SUITE 108 • MISSOULA, MT 59803-1489
TELEPHONE 406-543-2446 • FACSIMILE 406-829-3436

Larry W. Jones
406-543-2420
Larry.Jones@llawoffice.com

Carrie L. Garber
406-543-2434
Carrie.Garber@llawoffice.com

August 20, 2004

Norman L. Newhall
Linnell, Newhall, Martin & Schulke, PC
P.O. Box 2629
Great Falls, MT 59403

RE: Thompson, et al. v. State of Montana, WCC No. 2004-1089

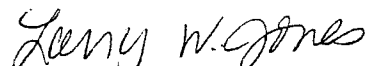
Dear Norm:

This is to follow up our telephone conversation of 8-19-04 regarding stipulated facts. It appears, as regards Liberty's participation, the following stipulation should be sufficient to show a justicable dispute.

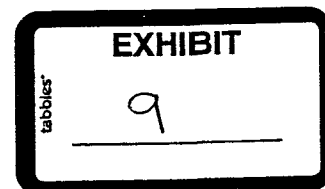
Liberty had ex parte communications with health care providers pursuant to MCA 39-71-604(3) and MCA 50-16-527(5) and it is Liberty's intent to continue to rely on these statutes to have ex parte communications to gather relevant information necessary to the handling and adjustment of workers' compensation claims.

I hope this stipulation is sufficient. If you would like to discuss it, please contact me at your convenience.

Very truly yours,


Larry W. Jones

LWJ/ap
cc: Brian Morris
cc: Dave Hawkins



Richard Martin
453-4500

Norman L. Newhall
LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.
300 4th Street North
P.O. Box 2629
Great Falls, Montana 59403
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Attorneys for Petitioners

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LEE N. THOMPSON, DARIN SHARP,
and SCOTT BAILEY,

Petitioners,

-vs-

STATE OF MONTANA,

Respondent

LIBERTY NORTHWEST INSURANCE
CORPORATION and MONTANA STATE FUND)

Intervenors.

WCC NO. 2004-1089

AFFIDAVIT OF ATTORNEY J. KIM SCHULKE

STATE OF MONTANA)
: ss
County of Cascade)

J. Kim Schulke, upon being duly sworn, on oath deposes and says:

1. I am an attorney in good standing, licensed to practice in state and federal courts in Montana, and actively practicing law in Great Falls, Montana. My practice regularly includes representation of workers' compensation clients in adjusting their claims

with workers' compensation insurers and, when necessary, advocating their claims before the workers' compensation court.

2. I recently represented Plaintiff, Darin Sharp, in the adjustment of his claim with the Montana State Fund. In the course of the adjustment, Montana State Fund retained Montana Health Systems, Inc., as its medical case manager. After being advised that an employee of Montana Health Systems, on behalf of Montana State Fund, had contacted the office of Mr. Sharp's treating physician to discuss the status of Mr. Sharp's case, and after being further advised that in the course of the discussion, the employee of Montana Health Systems had made derogatory remarks regarding Mr. Sharp's motive in pursuing the claim, I notified Montana Health Systems that Mr. Sharp had not given Dr. Gorsuch authority to discuss his medical treatment unless my office participated in the communication. I further requested that Montana Health Systems include my paralegal or myself in any direct contact with Dr. Gorsuch or his staff regarding Mr. Sharp's condition. In writing to Montana Health Systems, I understood it to be acting for and on behalf of Montana State Fund, as the workers' compensation insurer for Mr. Sharp's employer. A true and correct copy of my written request is annexed hereto as Exhibit 1.


3. In response to my written request, I received a letter from attorney Leo Ward on behalf of Montana Health Systems advising that under Senate Bill 450 (2003) revising §39-71-604 MCA, Montana Health Systems was entitled "to contact medical care providers without notice to or participation from claimants or their attorneys." A true and correct copy of Mr. Ward's response letter is annexed as Exhibit 2.

4. As a result of Mr. Ward's assertion of the rights of Montana Health Systems under §39-71-604, my paralegal and I were not notified of subsequent contacts with Dr. Gorsuch by Montana Health Systems or by other representatives of the Montana State Fund.

5. In my experience, since the passage of the revisions to §39-71-604 in 2003, representatives of workers' compensation insurers routinely converse with healthcare providers concerning medical care and treatment of workers' compensation claimants without prior notice to or participation by claimants or their attorneys.

Further Affiant sayeth not.

DATED this 15th day of October, 2004.


J. Kim Schulke

SUBSCRIBED and SWORN to before me this 15th day of October, 2004, by
J. Kim Schulke.

(Notary Seal)



Print: NORM NEWHALL
Notary Public for the State of Montana
Residing at Great Falls, Montana
My commission expires 6/16/08

CERTIFICATE OF MAILING

I certify under penalty of perjury that the foregoing was duly served upon the respective parties entitled to service by depositing a copy in the U.S. mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Mike McGrath
Montana Attorney General
Brian M. Morris, Solicitor
P. O. Box 201401
Helena, MT 59620-1401

David Hawkins
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759

Larry W. Jones
Law Office of Jones & Garber
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489

DATED this 15th day of October, 2004.



For Linnell, Newhall, Martin & Schulke

LINNELL, NEWHALL, MARTIN, & SCHULKE, P.C.

NORMAN L. NEWHALL*
RICHARD I. MARTIN
J. KIM SCHULKE
STACY TEMPEL-ST. JOHN
*NBTA Board Certified Civil Trial Specialist

WAYNE E. LINNELL
Of Counsel

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300 4th Street North
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(406) 453-4500
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J. Kim Schulke
(406) 454-5804
kschulke@lnms.net

PARALEGAL STAFF:
DANIEL J. BENNETT
MEL POZDER
NIKA EBERT

COPY

OUR FILE SH40-01

September 15, 2003

Viki M. White
Supervisor, MHS Helena Office
P.O. Box 1889
Helena, MT 59624

Re: Darin Sharp

Dear Ms. White:

In response to your letter of August 23, 2003, please provide me with a list of the physicians who are board certified in Montana who act as MHS medical advisors.

Further, due to the record in this case, if you intend to contact Dr. Gorsuch's office, please include my paralegal, Nika Ebert or me. This includes conversations with Dr. Gorsuch's staff. My client does not give Dr. Gorsuch authority to discuss his medical treatment unless our office participates in the communication.

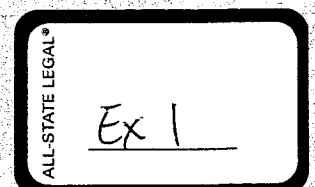
Sincerely,

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

J. Kim Schulke

JKS/ls

Cc: Darin Sharp
Dave Hawkins
Steven Scholl
Paul Gorsuch, M.D.



325
5117
BROWNING, KALECZYC, BERRY & HOVEN, P.C.

ATTORNEYS AT LAW

G. ANDREW ADAMEK
CHAD E. ADAMS
KIMBERLY A. BEATTY
LEO BERRY
BRAND G. BOYAR
R. STEPHEN BROWNING
KATHARINE S. DONNELLEY
MARK D. ETCHART
OLIVER H. GOE
AIMEE GRMOLJEZ
J. DANIEL HOVEN

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HELENA, MONTANA 59624
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CATHERINE A. LAUGHNER
DAVID M. MCLEAN
CRAIG M. MUNGAS
SARA B. STANTON
MARK R. TAYLOR
KIMBERLY L. TOWE
RENDRA M. VOLLER
STEVEN T. WADE
LEO S. WARD

September 19, 2003

RECEIVED
SEP 22 2003

J. Kim Schulke, Esq.
Linnell, Newhall, Martin & Schulke, P.C.
P.O. Box 2629
Great Falls, MT 59403-2629

Re: *Darin Clark (sic; s/b Sharp)*

Dear Kim:

My client, Montana Health Systems, asked me to respond to your letter of September 15, 2003, requiring notice to and participation from your office related to contacts with Dr. Gorsuch. Your position is contrary to the Senate Bill 450 revision to Mont. Code Ann. § 39-71-604. Under the current law, a signed claim form or release allows insurers and their agents to contact medical care providers without notice to or participation from claimants or their attorneys. If you think the law does not apply to your firm or Mr. Clark, please let me know.

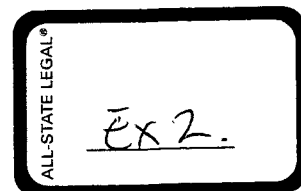
I look forward to hearing from you.

Sincerely,

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By *Leo S. Ward*
Leo S. Ward

LSW/sar
cc: Ramona St. George



1880.000/125126

Richard Martin
453-4500

Norman L. Newhall
LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.
300 4th Street North
P.O. Box 2629
Great Falls, Montana 59403
Telephone: (406) 453-4500
Attorneys for Petitioners

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and SCOTT BAILEY,

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Respondent.

LIBERTY NORTHWEST INSURANCE
CORPORATION and MONTANA STATE FUND)

Intervenors.

WCC NO. 2004-1089

AFFIDAVIT OF ATTORNEY STACY TEMPEL-ST. JOHN

STATE OF MONTANA)
: ss
County of Cascade)

Stacy Tempel-St. John, upon being duly sworn, on oath deposes and says:

1. I am an attorney in good standing, licensed to practice in state and federal courts in Montana, and actively practicing law in Great Falls, Montana. My practice regularly includes representation of workers' compensation clients in adjusting their claims

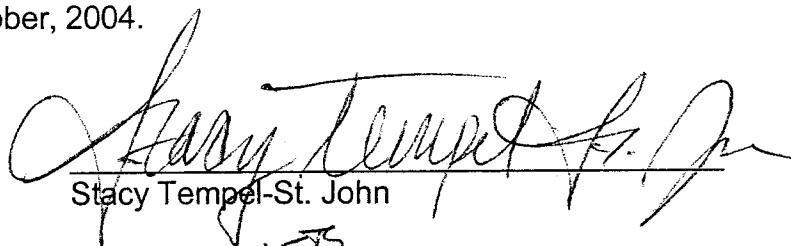
with workers' compensation insurers and, when necessary, advocating their claims before the workers' compensation court.

2. In 2004, I represented a workers' compensation claimant who, for reasons of confidentiality, I will identify as Jane Doe. The workers' compensation insurer for Jane Doe's claim was Technology Insurance Company. The insurer retained Maffei George Medical Consulting as its medical case manager. In March 2004, I wrote the medical case manager requesting that she refrain from speaking with Jane Doe's medical providers without first making arrangements for our office to participate in the conversations. The request was reiterated in a subsequent letter in March 2004. The medical case manager was reminded of my request by a letter from my paralegal in April 2004. In a subsequent letter from the medical case manager in April 2004, I was assured that I would be notified of any "appointment" the case manager made to meet with the treating physician so that I would have an opportunity to attend. In May 2004, as evidenced by a clinic note from Jane Doe's treating physician, the medical case manager conferred with the treating physician regarding an upcoming panel evaluation without notice to or participation by me. True and correct copies of the letters and clinic note evidencing the above matters are annexed as Exhibits 3, 4, 5, 6 and 7.

3. In my experience, since the passage of the revisions to §39-71-604 in 2003, representatives of workers' compensation insurers routinely converse with healthcare providers concerning medical care and treatment of workers' compensation claimants without prior notice to or participation from claimants or their attorneys.

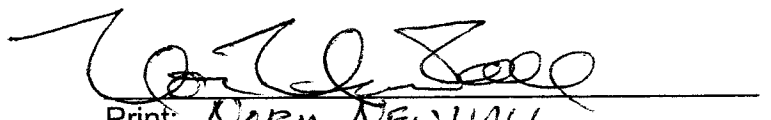
Further Affiant sayeth not.

DATED this 15th day of October, 2004.


Stacy Tempel-St. John

SUBSCRIBED and SWORN to before me this 15th day of October, 2004, by Stacy Tempel-St. John.

(Notary Seal)


Print: NORM NEWHALL
Notary Public for the State of Montana
Residing at Great Falls, Montana
My commission expires 6/16/08

CERTIFICATE OF MAILING


I certify under penalty of perjury that the foregoing was duly served upon the respective parties entitled to service by depositing a copy in the U.S. mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Mike McGrath
Montana Attorney General
Brian M. Morris, Solicitor
P. O. Box 201401
Helena, MT 59620-1401

David Hawkins
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759

Larry W. Jones
Law Office of Jones & Garber
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489

DATED this 15th day of October, 2004.



For Linnell, Newhall, Martin & Schulke

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

NORMAN L. NEWHALL
RICHARD J. MARTIN
J. KIM SCHULKE
STACY TEMPEL-ST. JOHN
NBTA Board Certified Civil Trial Specialist

WAYNE E. LINNELL
Of Counsel

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FAX (406) 454-8000
Home page: www.linnellandattorneys.com

PARALEGAL STAFF:
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NIKA EBERT
TAMMY TURNER
RAY WILLIAMS
ROBYN OLSON

Stacy Tempel-St. John
(406) 454-5814
sstjohn@lnms.net

OUR FILE [REDACTED]

March 1, 2004

Suzanna Maffer
Medical Case Manager
Maffer George Medical Consulting
PO Box 7427
Missoula, MT 59807

Re: [REDACTED]

Dear Ms. Maffer:

Our firm has been retained to represent [REDACTED] in her workers' compensation case. Therefore any communications will be directed through this office. Furthermore, we demand no further contact between you and Ms. [REDACTED]'s medical providers without our presence. In the event you need to speak to Ms. [REDACTED]'s medical providers, please advise, so we may make arrangements to participate.

If you should have any questions or comments, please do not hesitate to contact me.

Sincerely,

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

Stacy Tempel-St. John

STS/ls
cc: [REDACTED]

EXHIBIT

3

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

NORMAN L. NEWHALL*
RICHARD J. MARTIN
J. KIM SCHULKE
STACY TEMPEL-ST. JOHN
*NBTA Board Certified Civil Trials Specialist

Attorneys at Law
300 4th Street North
P.O. Box 2629
Great Falls, MT 59403
(406) 453-4500
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FAX (406) 454-8000
Home page: www.linnellandattorneys.com

PARALEGAL STAFF:
DANIEL J. BENNETT
NIKA EBERT
TAMMY TURNER
RAY WILLIAMS
ROBYN OLSON

WAYNE E. LINNELL
Of Counsel

Stacy Tempel-St. John
(406) 454-5814
sstjohn@lnms.net

OUR FILE [REDACTED]

March 2, 2004

Suzanna Maffei
Medical Case Manager
Maffei George Medical Consulting
PO Box 7427
Missoula, MT 59807

Re: [REDACTED]

Claim No: [REDACTED]

Dear Ms. Maffei:

Today I received a copy of the Medical Case Management Report No. 1 that you prepared and provided with regard to [REDACTED]. With regard to the Case Management Plan, we will be happy to cooperate with your involvement in this matter; however, any communications with [REDACTED] will be arranged through this office. Also, you make reference that you will consult with Dr. [REDACTED] following his evaluation of [REDACTED] on April 2, 2004. As I indicated in my letter of March 2, 2004 to you, I demand that there be no further contact between you and [REDACTED]'s medical providers without our presence. Accordingly, please provide me with the time and location of your meeting with Dr. [REDACTED], so that we can be present for that discussion.

If you should have any questions or comments, please do not hesitate to contact me.

Sincerely,

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.


Stacy Tempel-St. John

STS/ls
cc: [REDACTED]

ALL-STATE LEGAL®

Ex 4

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

NORMAN L. NEWHALL*
RICHARD J. MARTIN
J. KIM SCHULKE
STACY TEMPEL-ST. JOHN
*NBTA Board Certified Civil Trial Specialist

WAYNE E. LINNELL
Of Counsel

Attorneys at Law
300 4th Street North
P.O. Box 2629
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DANIEL J. BENNETT
NIKA EBERT
TAMMY TURNER
RAY WILLIAMS
ROBYN OLSON

Ray Williams
406-454-5806
rwilliams@lnms.net

OUR FILE [REDACTED]

April 1, 2004

Suzanna Maffei
Medical Case Manager
Maffei George Medical Consulting
PO Box 7427
Missoula, MT 59807

Re [REDACTED]
Claim No. [REDACTED]

Dear Ms. Maffei:

We have not received a response to our March 19, 2004 letter to you. Please advise as to whether you will be consulting Dr. [REDACTED] following his evaluation of [REDACTED] on April 1, 2004.

If you have any questions, please give us a call.

Sincerely,

LINNELL, NEWHALL, MARTIN & SCHULKE, P.C.

Ray Williams, Paralegal

RW/ls
cc: [REDACTED]

ALL-STATE LEGAL®

Ex 5

STS ✓

P.O. Box 7427
Missoula, MT 59807
Phone: 406-541-8855
Fax: 406-541-8857

**Maffei-George Medical
Consulting, Inc.**

Fax

To: Stacy Tempel-St. John, Esq. **From:** Sue Maffei, RN, CCM
Fax: 406-454-8000 **Date:** 4/6/04
Phone: **Pages:** 3
Re: [REDACTED] **CC:** [REDACTED]

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

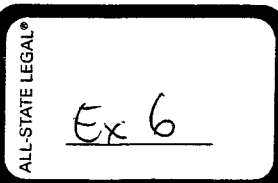
Dear Ms. Tempel-St. John:

I have received your correspondence dated 4/6/04. I have been traveling and unable to respond before this date. You will be notified of any appointment I make to meet with the treating physician so that you have an opportunity to attend as well. I will copy you on all correspondence I generate and will fax you immediately any faxed correspondence to include any faxed response from the physician.

I am disappointed that you prefer all communication with Ms. [REDACTED] to go through your office. This will delay any assessment and assistance I can provide in ensuring that Ms. [REDACTED] receives prompt and effective treatment. Please contact me at your convenience to discuss. I can be reached at 406-541-8855.

Sue Maffei

CONFIDENTIALITY



2

49238-04947

5/04

Pelvis - no percussion tenderness about either SI joint. Increased right lower back pain with right piriformis stretch; negative left piriformis stretch.

NEUROLOGICAL: Unremarkable.

MENTAL STATUS: Much less anxiety.

IMPRESSION:

1. (729.1) Myofascial lower back pain, near maximum medical improvement.
2. (722.52) Lumbar disc disease, status post surgery (see above), stable.
3. (724.4) Right lumbar radiculitis, improved.
4. (780.5) Sleep disturbance, improved.
5. (296.3) Depressive disorder, improved.

PLAN:

1. Continue current medications. Long discussion regarding tapering off Klonopin and Tylox. Ms. [REDACTED] states "I only take Klonopin when my muscles spasm (1-2 per week)", and has decreased Tylox to 0-2 per day.
2. Encouraged to begin a daily walking program, to try to build up to one mile per day. If she finds she is unable to do this, I encouraged her to do a pool program at HealthSouth.
3. Prescription written for transition to self-supervised program, with once weekly meeting with her primary therapist to review her home exercise program.
4. Functional status as enclosed.
5. Return to clinic in one month for reevaluation and probable declaration of maximum medical improvement, sooner as needed.

ADDENDUM: Additional time was spent in conference with Ms. Maffei, R.N., Nurse Case Manager, regarding the upcoming panel evaluation.

[REDACTED]
[REDACTED] M.D.
[REDACTED]

Great Falls, MT 59401
[REDACTED]

cc: Insurance

cc: Stacy Tempel-St. John, AAL
Fax 454-8000 ✓

enc: Functional Summary 5/04 ✓

kvh

ALL-STATE LEGAL®

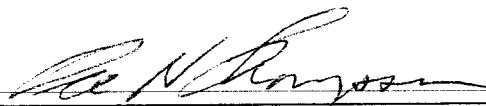
Ex7

2. I am the Claimant with respect to a workers' compensation claim in which the Montana State Fund is the insurer.

3. My treating physician is Ronald Peterson, M.D., of Great Falls. I was examined by Dr. Peterson at his clinic on May 6, 2004. Several days after the examination, Dr. Peterson was contacted by the adjuster for the Montana State Fund. In the phone call, the adjuster questioned Dr. Peterson's recommendation for additional physical therapy and it otherwise appears from Dr. Peterson's office memorandum regarding the call, my medical condition was discussed in some detail. I have never authorized the adjuster or my treating physician to discuss my medical care condition privately and without my participation or the participation of my attorney. A true and correct copy of Dr. Peterson's memorandum evidencing the conversation between the adjuster and Dr. Peterson is annexed as Exhibit 8.

Further Affiant sayeth not.

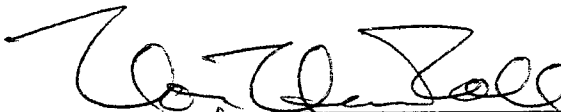
DATED this 15th day of October, 2004.



Lee N. Thompson

SUBSCRIBED and SWORN to before me this 15th day of October, 2004, by Lee N. Thompson.

(Notary Seal)



Print: NORM NEWHALL

Notary Public for the State of Montana

Residing at Great Falls, Montana

My commission expires 6/16/08

CERTIFICATE OF MAILING

I certify under penalty of perjury that the foregoing was duly served upon the respective parties entitled to service by depositing a copy in the U.S. mail at Great Falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Mike McGrath
Montana Attorney General
Brian M. Morris, Solicitor
P. O. Box 201401
Helena, MT 59620-1401

David Hawkins
Montana State Fund
P. O. Box 4759
Helena, MT 59604-4759

Larry W. Jones
Law Office of Jones & Garber
700 SW Higgins Avenue, Suite 108
Missoula, MT 59803-1489

DATED this 15 day of October, 2004.

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For Linnell, Newhall, Martin & Schulke

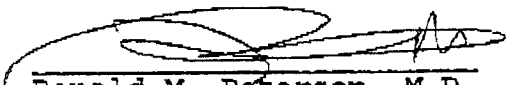
MEMORANDUM

Date: 5/12/04
Patient Name: Lee Thompson
Claim #: 03-04-06130-2

I received a call from Ms. Strobel, claims adjuster for Mr. Thompson's claim. She had some questions about why Mr. Thompson was being sent back to physical therapy after he had received a "full release" from his general surgeon, Dr. Winslow. I expressed to Ms. Strobel that I did not feel Mr. Thompson was conditioned adequately to return to a very heavy physical demand level job, such as ranch hand. From our discussion and his examination at last clinic (May 6, 2004), Mr. Thompson had reproducible pain of his left groin, as well as left-sided lower back pain with any resisted flexion of his left hip muscles, and it was my concern that if he returned to work at a very heavy physical demand without some conditioning and strengthening, he was at high risk for worsening his current symptoms. I feel that Dr. Winslow released from his follow-up care, because Mr. Thompson had healed adequately from his surgery, but I feel strongly that Mr. Thompson needs conditioning and strengthening before he will be capable of returning to full-time work without restrictions as a ranch hand.

It was my understanding that the return to physical therapy at HealthSouth had been authorization. Dictation from the May 6, 2004 clinic has not returned from transcription, but I did fax a copy of the prescription for physical therapy, and the functional summary of May 6, 2004 to Ms. Strobel.

Mr. Thompson is scheduled to return to our clinic June 8, 2004.


Ronald M. Peterson, M.D.
Occupational/Sports Medicine
1000 - 25 St. N., Suite 110
Great Falls, MT 59401
(406) 761-5220

cc: Kathy Strobel
MSF ✓

cc: Norm Newhall, AAL ✓

kvh

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Richard Martin
453-4500

M153-28
✓ 11/7/05
plds

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2005 MTWCC 53

WCC No. 2004-1089

LEE N. THOMPSON, DARIN SHARP, and SCOTT BAILEY

Petitioners

FILED

vs.

OCT 18 2005

STATE OF MONTANA

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

Respondent

LIBERTY NORTHWEST INSURANCE CORPORATION and
MONTANA STATE FUND

Intervenors.

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT

Summary: Petitioners filed an action for declaratory judgment seeking to have this Court declare subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), unconstitutional as violative of Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Petitioners subsequently filed motions for summary judgment on these issues.

Held: Summary judgment is granted. Section 39-71-604(3), MCA (2003), and section 50-16-527(5), MCA (2003), violate the petitioners' constitutional right of privacy as guaranteed by Mont. Const., Art. II, § 10, and no compelling state interest exists to justify such violation. Moreover, the Court also finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), violate the petitioners' constitutional right to due process as guaranteed by Mont. Const., Art. II, § 17, and no rational basis exists to justify such violation.

Topics:

Constitutional Law: Privacy. Mont. Const., Art. II, § 10, prohibits insurers or their representatives from engaging in *ex parte* communications with a claimant's treating health care provider under the auspices of either section 39-71-604(3), MCA (2003), or section 50-16-527(5), MCA (2003).

DOCKET ITEM NO. 47

Constitutional Law: Due Process. Mont. Const., Art. II, § 17, prohibits insurers or their representatives from engaging in *ex parte* communications with a claimant's treating health care provider under the auspices of either section 39-71-604(3), MCA (2003), or section 50-16-527(5), MCA (2003).

Constitutions, Statutes, Rules, and Regulations: Montana Code Annotated: 39-71-604(3) and 50-16-527(5), MCA (2003). Sections 39-71-604(3) and 50-16-527(5), MCA (2003), which allow an insurer or its agent to communicate with a physician or other health care provider about an injured employee's health care information by telephone, letter, electronic communication, in person, or by other means and to receive from the physician or health care provider the sought after information without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death are violative of Mont. Const., Art. II, §§ 10 and 17.

Attorney Fees: Private Attorney General Theory. The petitioners are entitled to attorney fees pursuant to the private attorney general theory. Protecting fundamental constitutional rights is of the highest societal importance; the need for private individuals to vindicate these constitutional rights was apparent where the State of Montana was defending the constitutionality of these statutes in the litigation; and, all claimants in the Montana Workers' Compensation system stand to benefit from the petitioners' actions.

¶1 The petitioners have petitioned this Court for a declaratory judgment that subsection (3) of section 39-71-604, MCA (2003), and subsection (5) of section 50-16-527, MCA (2003), are unconstitutional pursuant to Mont. Const., Art. II, §§ 10 and 17, and/or the Fifth and Fourteenth Amendments to the United States Constitution. Although disputing the merits of the petitioners' claims, all parties to this action agree that the issues raised by the petitioners are appropriate for declaratory judgment by this Court. The petitioners then moved for summary judgment on these issues. For the reasons set forth below, the petitioners' motions for summary judgment are granted.¹

¹ The petitioners' original Petition for Declaratory Judgment sought a ruling that the subject statutes were violative only of Mont. Const., Art. II, § 10. Subsequent to the original filing of their petition and the filing of their first motion for summary judgment, however, the petitioners sought and were granted leave from this Court to allege violations of Mont. Const., Art. II, § 17, and the Fifth and Fourteenth Amendments to the United States Constitution. The petitioners then filed a second motion for summary judgment addressing these additional provisions. This Order will deal with all of the issues raised in both of the petitioners' motions for summary judgment collectively.

FACTUAL BACKGROUND

¶2 The petitioners are or have been injured employees with claims for workers' compensation benefits under the workers' compensation laws of the State of Montana. During the administration of the petitioners' workers' compensation claims, the workers' compensation insurers for the petitioners, or their agents, have engaged in private communications with the petitioners' physicians or other health care providers or have otherwise asserted the right to engage in such private communications under the auspices of sections 39-71-604(3) or 50-16-527(5), MCA (2003). Both of these sections were passed by the 2003 Legislature and were signed into law in April 2003. No constitutional challenges have previously been made to either statutory section.

DISCUSSION

¶3 The challenged language contained in both of the statutes at issue is substantively identical. In its entirety, section 39-71-604(3), MCA (2003), reads as follows:

A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (2), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (2) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

¶4 In its entirety, section 50-16-527(5), MCA (2003), reads as follows:

A signed claim for workers' compensation or occupational disease benefits or a signed release authorizes a workers' compensation insurer, as defined in 39-71-116, or the agent of the workers' compensation insurer to communicate with a physician or other health care provider about relevant health care information, as authorized in subsection (4), by telephone, letter, electronic communication, in person, or by other means, about a claim and to receive from the physician or health care provider the information authorized in subsection (4) without prior notice to the injured employee, to the employee's authorized representative or agent, or in the case of death, to the employee's personal representative or any person with a right or claim to compensation for the injury or death.

¶5 These sections were enacted pursuant to Senate Bill 450 (SB 450), passed by the 2003 Legislature. Nothing in the legislative history, however, offers any particularly helpful insight as to the purpose of this bill as it pertains to these specific sections. The only insight presented

to this Court as to the Legislature's motivation is a Fiscal Note, submitted by the petitioners, which pertains to the financial impact of other, unrelated provisions of SB 450. At paragraphs 4 and 5 of this Fiscal Note is an apparent reference to the statutory amendments at issue in this case. The entire sum and substance of these references, however, is an acknowledgment that SB 450 will allow private "communication of relevant medical information between the insurer, or agent thereof, and the health care provider." As to the justification for this expanded access, the Fiscal Note says only: "The proposal will make the process more efficient, and thereby reduce costs. The more quickly the insurer can receive information on the status of the claimant, the more quickly they can authorize certain procedures to hasten the process."

¶6 Save for this brief reference, the Court is left with virtually no background against which to assess whether a compelling state interest exists to allow a workers' compensation insurer or its agent the essentially unfettered access to an injured workers' physician or health care provider as prescribed by these sections.

A. Montana Constitution, Article II, Section 10. Right of Individual Privacy.

¶7 Article II, Section 10 of the Montana Constitution provides:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

¶8 The Montana Supreme Court has long recognized that the privacy interests attendant an individual's medical information implicate Article II, Section 10 of the Montana Constitution. Specifically, the Court has most recently held: "Medical records are private and deserve the utmost constitutional protection. Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one's medical records."² That being the case, the very language of Article II, Section 10 mandates that a compelling state interest be shown in order for the statutory sections at issue in the present case to survive a constitutional challenge. Additionally, since the right of individual privacy is among those rights guaranteed by the Montana Constitution's Declaration of Rights, it is deemed a fundamental right.³ Any statute which implicates a fundamental right must be strictly scrutinized and can only survive scrutiny

² *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.3d 38, ¶ 36 (internal quotations and citations omitted).

³ *Montana Env'tl. Info. Cent. v. Department of Env'tl. Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, ¶ 63.

if a compelling state interest is established and its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the state's objective.^{4, 5}

¶9 This Court recognizes, however, that this fundamental right of individual privacy is not inviolate. When a claim for workers' compensation is filed, the claimant appropriately relinquishes his or her privacy rights to all medical records and information which are relevant to the claim. The respondent and intervenors have argued that sections 39-71-604(3) and 50-16-527(5), MCA (2003), pass constitutional muster because these statutory sections only allow the insurer or its representative to privately discuss relevant health care information with a health care provider. The principal problem with this argument, however, lies in the broad scope of what constitutes relevant health care information as that term is defined in the preceding subsection of both statutes. Specifically, the identical definition found in both statutes reads as follows:

Health care information relevant to the claimant's condition may include past history of the complaints of or the treatment of a condition that is similar to that presented in the claim, conditions for which benefits are subsequently claimed, other conditions related to the same body part, or conditions that may affect recovery.⁶

¶10 In light of this broad definition, an insurer might inquire of the health care provider into areas wholly unrelated to the injury for which a claim has been made under the rubric of "conditions that may affect recovery," conditions "similar" to that presented in the claim, or "conditions related to the same body part."

¶11 By way of example, it is not inconceivable that an insurer may inquire into a claimant's history of mental illness, no matter how remote or irrelevant to the claimed injury, since a claimant's mental health "may" affect his or her recovery. Similarly, the breadth of this statute would allow an insurer to inquire into a claimant's medical history of conditions which are in no way related to the claimed injury simply because they involve the same body part. Finally, as

⁴ *Id.*

⁵ This Court is mindful that the Montana Supreme Court has previously applied a rational basis test in analyzing the constitutionality of workers' compensation statutes. However, those cases in which a rational basis test was applied involved equal protection challenges which neither infringed upon the rights of a suspect class nor involved fundamental rights which would have triggered a strict scrutiny analysis. *Henry v. State Comp. Ins. Fund*, 1999 MT 126, 294 Mont. 449, 982 P.2d 456, ¶ 29. Conversely, the present case involves a fundamental right which *does*, therefore, trigger a strict scrutiny analysis.

⁶ §§ 39-71-604(2) and 50-16-527(4), MCA (2003).

to conditions "similar" to that presented in the claim, the degree of similarity is essentially left to the discretion of the insurer as the inquiring party. This is not to impute ill intent to the representatives of those insurers who would privately inquire of a claimant's treating health care provider. However, in situations such as these, what is or is not relevant is often in the eye of the beholder.

¶12 Intervenor Montana State Fund (State Fund) further argues that "[t]he right of privacy in the information and any privilege to the information is shed when the claimant files a claim for workers compensation benefits."⁷ State Fund notes that, in signing a claim form, the worker acknowledges, in pertinent part:

This is my claim for workers' compensation benefits due to the on-the-job injury, occupational disease or death of the above named worker. **I understand** that signing this claim for compensation authorizes the release of rehabilitation records, Social Security records and health care information (medical records pursuant to HIPAA, Public Law 104-191, 42 U.S.C. 1301 et seq. and Section 50-16-527(4)&(5), MCA and Section 39-71-604(2)&(3), MCA – refer to the back of this form) relevant to this claim to the workers' compensation insurer and the insurer's agents. . . .⁸

¶13 The circuitous logic employed seems to be that the petitioners have no constitutional right to privacy in this matter because the very statutes which are now being challenged as unconstitutional require a claimant to waive this privacy right. Employing the same logic, however, a finding that these statutes are violative of a claimant's constitutional right to privacy would render the above-quoted waiver null and void, *ab initio*, to the extent it relies upon the challenged language.

¶14 Moreover, if the Court were to uphold these statutes and, by extension, the waiver cited above by the State Fund, Montana workers who sustain injury on the job would be faced with the Hobbesian choice of either signing a form, the result of which is an unchecked abrogation of their constitutional right of privacy, or otherwise forfeiting their constitutional right to pursue life's basic necessities in the form of wage supplement as well as their right to seek safety, health, and happiness by way of the workers' compensation medical benefits.⁹ This Court is

⁷ (Response of Intervenor Montana State Fund to Petitioners' Motion for Summary Judgment at 2.)

⁸ *Id.*

⁹ Section 39-71-105(1), MCA (2003), states that it is an "objective of the Montana workers' compensation system to provide, without regard to fault, wage supplement and medical benefits to a worker suffering from a work-related injury or disease." In *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172 (1996), the

not persuaded that, when drafting the Declaration of Rights to Montana's Constitution, the delegates to the 1972 Constitutional Convention contemplated that *any* of the rights guaranteed by this Declaration should be mutually exclusive of one another.

¶15 Finally, this waiver fails to address the fundamental concern, raised above, that the definition of relevance in the subject statutes is so broad and sweeping as to conceivably allow inquiry into areas wholly *irrelevant* to the claimant's claim with the determination of relevance being essentially left to the sole discretion of the insurer. None of the parties have advanced the theory that the filing of a workers' compensation claim could properly result in the waiver of privacy regarding irrelevant medical information. Indeed, the respondent itself has cited this Court to the Supreme Court's pronouncement in *Henricksen* that a party "is *not* entitled to unnecessarily invade [a claimant's] privacy by exploring totally unrelated or irrelevant matters."¹⁰ This is precisely the practical result of these statutes, however, and by incorporating them into the waiver language set forth above, the waiver likewise incorporates their constitutional infirmity.

¶16 The Court next turns to whether the respondent or the intervenors have demonstrated a compelling state interest and that this action is closely tailored to effectuate that interest to achieve the State's objective. The Montana Supreme Court has previously held that "to demonstrate that its interest justifying infringement of a fundamental constitutional right is 'compelling' the state must show, at a minimum, some interest 'of the highest order and . . . not otherwise served,' or 'the gravest abuse . . . endangering [a] paramount [government] interest'"¹¹

¶17 In the present case, the only argument advanced in this regard is that the amendments to these statutes were designed to enhance communication between the health care providers and the insurers to facilitate the process. This Court would be hard pressed to find that administrative expediency of a workers' compensation claim is an interest "of the highest order" justifying the infringement of a fundamental constitutional right. This is particularly so when there are other, less intrusive means available.

Montana Supreme Court held that the right to pursue employment necessarily implicated the right to pursue life's basic necessities because "[a]s a practical matter, employment serves not only to provide *income for the most basic of life's necessities*, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other *essentials of modern life, including health and medical insurance*, retirement, and day care." (Emphasis added.)

¹⁰ *Henricksen, supra*, ¶ 41 (emphasis added).

¹¹ *Armstrong v. State*, 1999 MT 261, 296 Mont. 361, 989 P.2d 364, ¶ 41, n. 6.

B. Petitioners' Rights to Due Process of Law Pursuant to Article II, Section 17 of the Montana Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

¶18 Having found sections 39-71-604(3) and 50-16-527(5), MCA (2003), unconstitutional pursuant to Article II, Section 10, the Court need not address the due process challenges raised in Petitioners' Second Motion for Summary Judgment. For the record, however, and for many of the same reasons set forth above, the Court finds this challenge also to be well taken.

¶19 Since the petitioners' due process challenge implicates a fundamental right enumerated in the Montana Constitution's Declaration of Rights, it may properly be held to a strict scrutiny standard.¹² This Court finds, however, that these statutes do not pass due process muster even applying a rational basis test. Since it is axiomatic that a statute that cannot survive a rational basis challenge, obviously, cannot survive either of the higher constitutional standards, the Court will apply the lowest standard for purposes of its analysis.

¶20 Article II, Section 17 of the Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." As pointed out by the petitioners, and undisputed by the respondent and the intervenors, administration of the Workers' Compensation Act is a physician-driven system. Many benefits available under the Act may be either reduced or denied outright based solely upon the opinion of the treating physician.

¶21 Intervenor Liberty Northwest Insurance Corporation (Liberty) argues that a claimant's due process rights are not violated by allowing the insurer to privately communicate with treating health care providers because the claimant ultimately has the right to petition this Court to seek redress for a denial of benefits after the insurer has denied or terminated benefits. The focus of Liberty's due process argument is essentially a "timing" argument. Specifically, Liberty argues that due process does not require notice and an opportunity to be heard before the insurer's termination of benefits. Liberty's argument is misplaced.

¶22 The due process implications in the present case are not so much whether a claimant is afforded the opportunity to be heard before or after the insurer makes the decision to terminate benefits. Rather, the due process implications arise when, in a physician-driven system such as workers' compensation, the claimant is not afforded the opportunity to be present *at all* when the insurer meets with, and may solicit determinative opinions from, the claimant's treating physician.

¶23 The fact that the claimant may subsequently petition this Court after the treating physician has rendered his or her opinion does not cure the due process deficiency. By the time the matter would be brought before this Court, the insurer or its representative may have

¹² *Montana Env'tl. Info. Cent. v. Department of Env'tl. Quality, supra.*, ¶ 63.

met privately with the treating physician and a determinative opinion may have been solicited from the physician. Additionally, there are no procedural safeguards in place as to how much or what of the conversation's content is documented. In effect, the proverbial horse will have long since left the barn by the time this Court hears the matter.

¶24 In the case of *Linton v. City of Great Falls*,¹³ the Montana Supreme Court specifically disallowed the very practice which is at issue in the present case, i.e., private communications between treating health care providers and insurers or employers. In so doing, the Court in *Linton* implicitly acknowledged the same due process concerns raised in the present case. Specifically, the *Linton* Court held that the Workers' Compensation Act "does not contemplate . . . private interviews between the employer or insurer [and treating health care providers] without the knowledge or opportunity of the claimant to be present."¹⁴ In fact, the workers' compensation statutes in place at the time *Linton* was decided neither expressly authorized nor prohibited such a practice. Nevertheless, the Court found that such private communications were not allowed because "a personal interview between defendant insurance company and claimant's treating physician must be done openly to allay any suspicion that there is something available to one party and not to the other."¹⁵

¶25 The extent of due process to which a claimant is entitled is determined by balancing three elements:

- (1) the private interests at stake;
- (2) the government's interest; and
- (3) the risk that the procedures used will lead to erroneous decisions.¹⁶

¶26 In the present case, the private interest at stake is an individual's claim for workers' compensation benefits. As noted above at footnote 9, section 39-71-105, MCA (2003), identifies an objective of the Montana Workers' Compensation Act to provide wage supplement and medical benefits to Montana workers injured on the job. The Supreme Court in *Wadsworth v. State*¹⁷ held that employment provides "income for the most basic of life's necessities, such

¹³ 230 Mont. 122, 749 P.2d 55 (1988).

¹⁴ *Id.* at 133, 749 P.2d at 62.

¹⁵ *Id.* at 134, 749 P.2d at 63.

¹⁶ *Matter of T.C.*, 240 Mont. 308, 314, 784 P.2d 392, 395 (1989).

¹⁷ 275 Mont. 287, 911 P.2d 1165 (1996).

as food, clothing, and shelter for the worker and the worker's family"¹⁸ Accordingly, the Court in *Wadsworth* held that the deprivation of income was, in effect, a deprivation of the right to pursue life's basic necessities as guaranteed by Article II, Section 3 of the Montana Constitution. Since workers' compensation benefits are designed to act as a substitute for the income lost as a result of an on-the-job injury, the deprivation of these benefits must similarly implicate the fundamental rights found at Article II, Section 3. To hold otherwise would be *non sequitur*.

¶27 This private fundamental right must then be balanced against the governmental interest at stake. In the present case, the only governmental interest that has been advanced is a theoretically more efficient administration of the workers' compensation system.

¶28 The final element of this balancing test is the risk that this procedure will lead to erroneous decisions. As discussed at length above, the procedures allowed by these sections grant an insurer's representative the right to privately discuss with a treating physician the medical condition of a claimant. The substance of these conversations may well be undocumented and the claimant is neither present nor, perhaps, even aware that the conversation is taking place. There are absolutely no safeguards to guarantee that completely extraneous, irrelevant, and prejudicial information may not be imparted to the physician which may well color his or her opinion of the claimant. Once the physician's opinion is rendered as a result of this private, undocumented conversation, a termination or reduction of benefits may result from that opinion. Although the claimant will retain the right to petition this Court for relief, this Court can render its decision only on the evidence that is put before it. If some of the most critical evidence presented to the Court is tainted at its inception, the relief available from this Court may well carry the same taint.

¶29 An application of this balancing test clearly preponderates in favor of a finding that a claimant's due process rights are not satisfied by the procedures allowed pursuant to sections 39-71-604(3) and 50-16-527(5), MCA (2003).

C. Attorney Fees.

¶30 The petitioners have sought attorney fees in this matter pursuant to the private attorney general doctrine as set forth by the Montana Supreme Court in the case of *Montanans for Responsible Use of School Trust (MonTrust) v. State*.¹⁹ This doctrine provides that attorney fees may be awarded if three factors are met: (1) the societal importance of the public policy vindicated by the litigation; (2) the necessity for private enforcement; and (3) the number of people standing to benefit.

¹⁸ *Id.* at 299, 911 P.2d at 1172.

¹⁹ 1999 MT 263, 296 Mont. 402, 989 P.2d 800.

¶31 Liberty contends that attorney fees are not allowed because, at least as this matter pertains to the petitioners Thompson and Bailey, their injuries occurred after the 2003 amendments to sections 39-71-611(3) and -612(4), MCA (2003).²⁰ Liberty contends that these statutes prohibit an award of attorney fees in this case. The Court disagrees.

¶32 Both of the statutes cited by Liberty involve situations in which a claim is brought before the Workers' Compensation Court because an insurer either denies liability for a claim, terminates compensation benefits, or disputes the compensation due a claimant. In such cases, if the claimant prevails and the Court finds that the insurer acted unreasonably, attorney fees may be awarded. As Liberty correctly points out, these statutes specifically proscribe an award of attorney fees under the common fund doctrine or any other action or doctrine in law or equity. The triggering event to these statutes, however, is the bringing of a claim in the Workers' Compensation Court because of a denial of liability, termination of benefits, or dispute as to the compensation due. This is not the situation in the case at bar. None of the petitioners have alleged that the insurer denied liability, terminated benefits, or disputed the compensation due them. Rather, petitioners sought declaratory judgment regarding the constitutionality of two statutes, one of which is not even found within the workers' compensation statutes. Since the procedural predicate which triggers the application of these two statutes is not present, the statutory prohibitions found at subsections -611(3) and -612(4) do not apply.

¶33 Applying the factors set forth in *MonTrust*, the Court finds that an award of attorney fees is appropriate. The public policy vindicated by this litigation is the protection of two fundamental rights specifically guaranteed by the Montana Constitution's Declaration of Rights. There are few, if any, matters of greater societal importance than the protection of the citizenry's fundamental constitutional rights. The necessity for private enforcement of these rights is self-evident by the fact that the Montana Attorney General has appeared in support of these two challenged statutes. Finally, the number of people standing to benefit from the petitioners' actions is both significant and ongoing. Every Montana worker who files a claim for workers' compensation benefits has and, but for the petitioners' actions, would continue to suffer the compromise of their rights to privacy and due process.

JUDGMENT

¶34 For the foregoing reasons, the Court finds that sections 39-71-604(3) and 50-16-527(5), MCA (2003), are violative of Article II, Sections 10 and 17 of the Montana Constitution. Having so found, the Court need not address the constitutional challenge raised by the petitioners pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

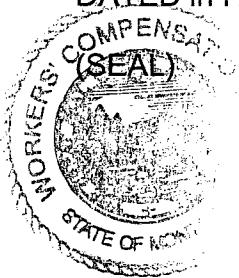
²⁰ Liberty acknowledges that petitioner Sharp's injuries occurred prior to the passage of sections 39-71-604(3) and 50-16-527(5), MCA (2003). Therefore, even if these statutes applied to the present action, an award of attorney fees would be appropriate at least as this matter pertains to Mr. Sharp.

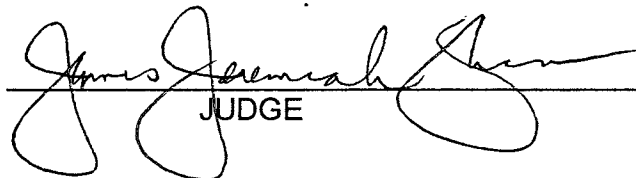
Accordingly, both of the petitioners' first and second motions for summary judgment are **granted**.

¶35 With respect to the petitioners' request for attorney fees, the Court finds this request to be well taken. The petitioners shall have 20 days to submit to this Court their time expended in bringing this action. The respondent and intervenors shall then have 20 days to file written objections.

¶36 This Order is certified as final for purposes of appeal.

DATED in Helena, Montana, this 18th day of October, 2005.




JUDGE

c: Mr. Norman L. Newhall
Mr. Mike McGrath
Mr. Anthony Johnstone
Mr. Larry W. Jones
Mr. David A. Hawkins
Submitted: June 24, 2005

SUPREME COURT BRIEF

ARGUMENTS REGARDING 39-71-604

Richard Martin
453
4500

issues between two courts; increase the likelihood of conflicting rulings; and compound time and expense for all litigants. Thus, State's solution hardly comports with the public policy requirement that the system be "designed to minimize reliance upon lawyers and the courts." §39-71-105(3). Further, in considering the constitutionality of workers compensation laws, the district courts are entering an area outside of their purview and additional questions of venue and joinder arise, further compromising judicial economy. As noted by Judge Shea, the WCC has interpreted the workers compensation laws for more than thirty years and is in the best position to make determinations of the constitutionality of such laws. *Ord. Den. Intervenor's Mtn. for Reconsid.*, ¶36, WCC Dkt #77.

The WCC has judicial power vested in it by the legislature pursuant to Article VII, §1 of the Montana Constitution. Within the sphere of workers compensation matters, the legislature has seen fit to vest the Court with judicial powers that are equivalent to the powers vested in a district court. As such, the WCC has jurisdiction to determine substantive constitutional issues relating to workers compensation matters.

II. SUBSECTION (3) OF §39-71-604 AND SUBSECTION (5) OF §50-16-527 VIOLATE CLAIMANTS' RIGHT TO PRIVACY UNDER ARTICLE II, SECTION 10 OF THE MONTANA CONSTITUTION.

To analyze the constitutionality of subsections (3) and (5) under Article II, §10 of the Montana Constitution, one must distinguish between (1) the insurers'

right of access to relevant medical information and (2) the method of access. State has a compelling state interest in the orderly administration of its workers compensation laws and, as part of such administration, it is necessary that insurers have access to relevant medical information. However, there is no compelling state interest to justify the method of access permitted under the offending statutes.

A. Standard of Review

Whether Claimants have a protected privacy interest in their medical records is determined by a two part test; namely: (1) whether the person involved has a subjective or actual expectation of privacy; and (2) whether society is willing to recognize that expectation as reasonable. *State v. Nelson*, (1997) 283 Mont. 231, 239, 941 P.2d 441. The Montana court adheres to one of the most stringent protections of its citizens' right to privacy in the country and the privacy right protected by the Montana Constitution "is more strict than that offered by the Federal Constitution." *Id*, 239-240. Medical records "are quintessentially 'private' and deserve the utmost constitutional protection." *Id*, 242. Thus, if the right of privacy "is to have any meaning it must, at a minimum, encompass the sanctity of one's medical records." *Id*, 242.

MSF asserts that the standard of review for considering Claimants' constitutional challenge under Article II, §10, is that legislative enactments are presumed valid. *MSF Br.*, p. 4. However, the cases cited by MSF concern the

constitutionality of statutes which did not infringe upon a fundamental right under the Montana Constitution. Thus, the statutes were subject only to the rational basis test.

Here, the right of privacy is explicit in the Declaration of Rights of Montana's Constitution and is therefore a fundamental right. *Armstrong v. State*, 1999 MT 261, ¶34, 296 Mont. 361, ¶34, 989 P.2d 364, ¶34; *Gryczan v. State*, (1997) 283 Mont. 433, 449, 942 P.2d 112, 122. Where legislation infringes upon the exercise of a fundamental right, the sufficiency of the legislation is reviewed under a strict scrutiny analysis and the burden shifts to the proponent of the legislation to demonstrate "a compelling State interest" for infringing the right. *Armstrong*, ¶34 and ¶41; *Gryczan*, 283 Mont. at 449, 942 P.2d at 122.

Further, to withstand strict scrutiny, the legislation must be justified by a compelling state interest and must be "narrowly tailored to effectuate only that compelling interest." *Armstrong*, ¶34; *Gryczan*, 283 Mont. at 449, 942 P.2d at 122. This means the legislation must "use the least restrictive means to accomplish its objective." *Valley Christian School v. Montana High School Association*, 2004 MT 41, ¶30, 320 Mont. 81, ¶30, 86 P.3d 554, ¶30 (citing *Armstrong*).

Thus, Appellants must show a compelling state interest in permitting workers compensation insurers and their agents to have access to medical

information of claimants by means of private communications with claimants' healthcare providers without notice to claimants and that such private communication is the least restrictive means to accomplish the objective of providing insurers with access to relevant medical information.

B. Discussion

1. Case law background.

Until the passage of Senate Bill 450, the ground rules for an insurer's access to relevant healthcare information regarding a workers compensation claim were reasonably well established.

In *Jaap v. District Court*, (1981) 191 Mont. 319, 623 P.2d 1389, the trial court observed that plaintiff, by filing an action which placed his medical condition in issue, waived the physician-patient privilege. In view of such waiver, the court concluded that physicians were no different than other witnesses. *Jaap*, 320-321. The trial court therefore ordered that defense counsel be permitted to interview the plaintiff's physicians privately.

The Supreme Court agreed that under Rule 35(b)(2) M.R.Civ.P., Jaap had waived the physician-patient privilege. However, the Supreme Court noted that Rule 26(a) permits discovery by certain very specific methods; namely, depositions, written interrogatories, etc. An order requiring that defense counsel be permitted to conduct private interviews with plaintiff's physicians was not one

of the “methods” of discovery permitted under the rules. It was therefore beyond the power of the trial court to order such interviews. *Id.*, 324.

The court in *Jaap* noted that “protective provisions [in the rules] which in effect provide for a record upon which a district court” may regulate discovery are “especially important.” *Id.*, 323. The obvious consequence of permitting the trial court to order a private interview is that the “sanctions and protections” under the rules “become unavailable for private interviews.” *Id.*, 324.

The *Jaap* rule was adopted in the context of a workers compensation case in *Linton v. City of Great Falls*, (1988) 230 Mont. 122, 749 P.2d 55. In *Linton*, the Supreme Court rejected the insurer’s argument it should be permitted to communicate with Linton’s physicians “to determine the nature and extent of a workers injury for purposes of compensating him.” *Linton*, 132. Rather “a personal interview between defendant insurance company and claimant’s treating physician must be done openly to allay any suspicion that there is something available to one party and not to the other.” *Linton*, 134.

Linton remained the law until the enactment of Senate Bill 450 in 2003. Now, under the aegis of subsections (3) and (5), insurance adjusters routinely contact claimant’s physicians for healthcare information. *Pet’r Br. in Supp. of SJ Mtn.*, Apps. A, B, C, and D, WCC Dkt #16.

The uneasy relationship between the disclosure of healthcare information and the right to privacy guaranteed to individuals under Article II, §10 of the Montana Constitution is discussed at length in *State v. Nelson, supra*. The *Nelson* court came down decidedly in favor of the right of privacy.

Nelson was convicted of driving under the influence. The prosecutor obtained Nelson's blood alcohol level by means of an investigative subpoena issued to Nelson's treating physician. Section 46-4-301 permitted a district court to issue an investigative subpoena upon affidavit of the prosecutor that the "administration of justice" so requires. Nelson argued that issuance of the subpoena violated his constitutional right to privacy under Article II, §10.

Although §46-4-301 did not define the "administration of justice" threshold, the court observed it is "safe to conclude" such threshold is "considerably less exacting than the 'compelling state interest' test demanded by Article II, §10 guarantee of privacy." *Id*, 242. Therefore, the court held that the "administration of justice" standard in §46-4-301 was unconstitutional. *Id*, 242.²

² The standard in *State v. Nelson* has become the benchmark in subsequent rulings regarding the privacy of healthcare information. See *Henricksen v. State*, 2004 MT 20, 319 Mont. 307, 84 P.2d 38; *St. James Hospital v. District Court*, 2003 MT 261, 317 Mont. 419, 77 P.3d 534; *State v. Ingraham*, 1998 MT 156, 290 Mont. 18, 966 P.2d 103; *Hulse v. State*, 1998 MT 108, 289 Mont. 1, 961 P.2d 75; *State v. Steinmetz*, 1998 MT 114, 288 Mont. 527, 961 P.2d 95; *State v. Newill*, (1997) 285 Mont. 84, 946 P.2d 134.

2. Subsections (3) and (5) do not withstand strict scrutiny under the compelling state interest test. ✓

MSF asserts the State has a compelling interest in “returning a worker back to work as soon as possible and to speedily pay benefits” and this objective is achieved by enhancing communication between healthcare providers and adjusters. *MSF Br.*, p. 11. Similarly, Liberty asserts that declaring the statutes unconstitutional will require insurers “to rely upon claimants and attorneys to obtain medical records” and will “delay exchange of medical information, delay the return of the worker to work or the initiation of rehabilitation, and provide no significant benefit to claimant.” *Liberty Br.*, p. 11. Appellants exaggerate. If the statutes are set aside, nothing in the law requires insurers to obtain relevant medical information from the claimant’s attorney. The insurer will continue to obtain the information from healthcare providers in the same manner as it did prior to the enactment of the statutes and during the 90-year history of the WCA.

The need of private insurers for administrative efficiency and convenience does not satisfy the compelling state interest test. Whether a state interest is “compelling” is determined on a case-by-case basis. *Armstrong*, ¶42, n. 6. However, at a minimum, a compelling state interest sufficient to justify the infringement of a fundamental right is some interest of the “highest order...[that is]

not otherwise served” or an interest which otherwise “involves the gravest abuse” or endangers a “paramount government interest.” *Armstrong*, ¶41, n.6.

The need to permit private discussions with a claimant’s healthcare provider is not an interest of the “highest order” that is “not otherwise served” by permitting access to medical information in the traditional fashion. Nor is there evidence that the statutes permitting such private discussions were implemented to solve a “grave abuse” or to serve a “paramount” government interest.

In *State v. Nelson*, *supra*, the “administration of justice” test undoubtedly involved considerations of efficiency and administrative convenience for law enforcement officers. Such convenience and efficiencies were not sufficient to establish a compelling state interest. Here, the fact that private insurers likewise prefer to have private communications with healthcare providers in the interest of efficiency and administrative convenience does not establish a compelling state interest which justifies the invasion of claimants’ privacy rights.

3. *Filing of a workers compensation claim is not a waiver of all privacy rights.*

Liberty asserts that workers compensation claimants waive their right to privacy when they file a claim. *Liberty Br.*, p. 14. Liberty overstates the extent of the waiver. A waiver incidental to the filing of a workers compensation or personal injury claim is not unlimited. *Henricksen v. State*, 2004 MT 20, ¶36, 319

Mont. 307, ¶36, 84 P.3d 38, ¶36. Thus, a defendant in a personal injury action “is not entitled to unnecessarily invade plaintiff’s privacy.” *Henricksen*, ¶30; *State ex rel Mapes*, (1991) 250 Mont. 524, 530, 822 P.2d 91, 95.

A narrow waiver of confidentiality in medical information relating to a workers compensation claim is not, as Liberty asserts, a broad form waiver wherein claimants agree that insurers can communicate privately with claimant’s physician. “For a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting to the waiver ... [a]nd, the waiver will be narrowly construed.” *Kloss v. Edward D. Jones and Company*, 2002 MT 129, ¶64, 310 Mont. 123, ¶64, 54 P.3d 1, ¶64. Similarly, see *State v. Bilant*, 2001 MT 249, ¶20, 307 Mont. 113, ¶20, 36 P.3d 883, ¶20 (person who voluntarily reveals limited medical information in a police interview does not forfeit his right under Article II, §10 of the Montana Constitution to claim confidentiality of his medical records).

This assertion assumes that an insurance adjuster, in a role that is potentially adverse to claimant, and a healthcare provider, untrained in the law, may make a unilateral, subjective determination of what healthcare information is or is not relevant to the claim. In waiving the confidentiality of healthcare information relevant to a workers compensation claim, a claimant does not unwittingly consent

to have the insurer and the healthcare provider unilaterally determine in a private phone conversation what information is relevant.

4. *Subsections (3) and (5) are overly broad and not narrowly tailored to effectuate only the compelling state interest.*

Noting that the private communications are limited to discussion of “relevant healthcare information,” State and MSF contend subsections (3) and (5) are narrowly tailored to effectuate the compelling state interest. This argument is ingenuous.

State has a compelling state interest in permitting workers compensation insurers access to relevant medical information. When a law infringes on a fundamental right, the legislature is required to use the “least restrictive means” consistent with the compelling state interest which justifies the law. Prior to the enactment of the offending provisions, such access was provided under the rules adopted in *Jaap*, *Linton*, and their progeny. The offending provisions now permit unfettered access by means of private communications with claimant’s healthcare providers. Such method of access is not the “least restrictive means” of furthering the state’s interest in permitting insurer access to relevant medical information.

Surreptitious private communications with a claimant’s healthcare providers invade an individual’s privacy solely in the interest of the private insurer and without any of the safeguards associated with traditional methods for discovery of

private information such as notice and opportunity to object, *in camera* review, protective orders, etc. Further, there is no compelling state interest in permitting the adjuster and the healthcare provider, without standards or guidelines, to unilaterally determine what healthcare information is relevant. Absent such standards or guidelines, the statutes permit discussion of healthcare information that may be outside of any waiver intended by claimant.

In short, the statutes are not narrowly tailored to give only relevant medical information to insurers. Rather, they are broadly tailored to permit uncontrolled discussions between adjusters and healthcare providers regarding claimant's healthcare information without procedures whereby claimants can protect privacy interests that may otherwise be invaded during such discussions.

5. *Claimants' remedy is not limited to non-disclosure.*

Liberty asserts that Claimants' right to privacy "protects the discovery of the information itself, not how clearly discoverable information, for which a person has waived his right of privacy, may be disclosed." *Liberty Br.*, pp. 14-15. This argument ignores the fact that the method of disclosure provided in the statute infringes upon or implicates privacy rights of claimants in medical information for which claimants have not waived confidentiality. The offending statutes fail to provide any procedure whereby claimants can protect themselves from the disclosure of healthcare information for which confidentiality has not been waived.

Claimants have retained all of the rights of privacy conferred under the Montana Constitution that have not been expressly waived. Where the offending statutes provide the means or methods whereby insurers can infringe upon the privacy rights of claimants which have not been waived, such statutes are unconstitutional and Liberty provides no authority to the contrary.

III. SUBSECTIONS (3) AND (5) VIOLATE CLAIMANTS' RIGHTS TO DUE PROCESS UNDER ARTICLE II, SECTION 17 OF THE MONTANA CONSTITUTION.

Liberty asserts that the due process issue raised by Claimants has already been decided in *Wiard v. Liberty Northwest*, 2003 MT 295, 318 Mont. 132, 719 P.2d 281. *Liberty Br.*, p. 5-6. *Wiard* did not involve the termination of benefits prior to notice and opportunity to participate. Liberty's block quotation from *Wiard* (*Liberty Br.*, p. 6) is selectively edited and does not accurately state the holding in *Wiard*. Specifically, the Supreme Court held that *Wiard* failed to provide any authority to support his due process argument and therefore "we will not consider an argument for which the litigant has failed to provide support...." *Wiard*, ¶30. Thus *Wiard* is not on point.

A. Claimants Have a Right to Due Process

A claimant's right to due process comes into play only if he has a "property or liberty interest" in his claim for benefits. *ISC Distributors, Inc. v. Trevor*, (1995) 273 Mont. 185, 903 P.2d 170, 173, citing *Vinyard v. King*, 728 F.2d 428,

430 (10th Cir., 1984). A property interest in a particular benefit arises when one has a “legitimate claim or entitlement” even though the existence or sufficiency of the claim is yet to be determined. *ISC*, 173, citing *Board of Regents v. Roth*, (1972) 408 U.S. 564, and *Bishop v. Wood*, (1976) 426 U.S. 341. A person has a property interest in a claim for benefits for due process purposes “if there are rules ... that support his claim of entitlement to the benefit and that he may invoke at a hearing.” *ISC*, 173-174 (citations omitted).

Here, Claimants have a claim of entitlement to workers compensation benefits under the WCA. Claimants have a property interest for due process purposes because there are rules that support their claims of entitlement and which they may invoke at a hearing. *ISC*, 174; see also *Lockhart v. New Hampshire Insurance*, 1999 MT 205, ¶24, 295 Mont. 467, ¶24, 984 P.2d 744, ¶24 (workers compensation medical benefits are property of the claimant), and *Wiard, supra*, ¶¶27-28, (workers compensation medical benefits are “property” for the purpose of a due process analysis). Other jurisdictions are in accord. See *Aranda v. Indust Cmsn*, (2000) 198 Ariz. 467, 11 P.3d 1006; *Moland v. Industrial Claim Appeals Office of State*, (2004, Colo.App.) 111 P.3d 507; *Whiteside v. Smith*, (2003 Colo.) 67 P.3d 1240; *McDowell v. Jackson Energy RECC*, (2002, Ky.) 84 S.W.3d 71;

Baksalary v. Smith, 579 F.Supp 218 (1984, D.C. Pa.) appeal dismissed sub. nom.

Allstate Insurance v. Baksalary, (1985) 469 U.S. 1146..

The extent of the due process to which a claimant is entitled is determined by balancing three factors:

1. The private interest at stake;
2. The government interest; and
3. The risk that the procedures used will lead to erroneous decisions.

Matter of TC, (1989) 240 Mont. 308, 784 P.2d 392, 395, citing *Lassiter v. Dept. of Social Services*, (1981) 452 U.S. 18.

Here, the private interest that is affected is a person's claim for workers compensation benefits. Most persons rely on wages for the basic necessities of life. Since workers compensation benefits are a wage substitute, the importance of such benefits to a claimant cannot be overestimated, and a claimant has a substantial "private interest" in the grant or denial of the benefits.

The government interest is minimal. The grant or denial of an individual's workers compensation claim has no effect on any vital government function such as public safety, national defense, regulation of commerce, taxation, sanitation, the delivery of essential services such as water, power or natural gas, etc.

Finally, since a claimant is generally the only advocate for his claim, there is a substantial risk of an erroneous decision unless he is given an opportunity to participate before determinations are made which may affect his benefit entitlement. Further, the risk of an erroneous denial or termination of benefits by the insurer is increased by the deference afforded to physician determinations under the WCA. Since the balance of the three factors preponderates in favor of the claimant, special care must be taken to protect the right of the claimant to due process.

B. Subsections (3) and (5) Violate Due Process.

Appellants cite *Stratemeyer, supra*, for the proposition that the issue is not whether it is possible to condemn the enactment, but whether it is possible to uphold the legislative enactment. *State Br.*, p. 13; *Liberty Br.*, p. 4. This statement is correct as far as it goes, but fails to consider the specific elements of a due process analysis under which the enactment must be scrutinized. A due process analysis involves a determination of whether a statute is “unreasonable or arbitrary when balanced against the purpose of the legislature in enacting the statute.” *Newville v. State*, (1994) 267 Mont. 237, 249, 883 P.2d 793, 800. The analysis includes a review of the statute’s “inherent procedural fairness” and the State, through enactment of the statute, “cannot use its power to take unreasonable, arbitrary or capricious action.” *Id.*, 249-250, 800-801. Further, a statute “must be

reasonably related to a permissible legislative objective” and may violate due process if it is “without any kind of procedural safeguard.” *Id.*, 252, 802.

1. Subsections (3) and (5) lack “inherent procedural fairness.”

The essence of “inherent procedural fairness” is the right to participate in the decision making process. Procedural fairness that satisfies substantive due process may include procedural safeguards to protect against arbitrary or capricious action (*Newville*, 252), the right to notice, and a “meaningful and timely opportunity to be heard *before* property is taken.” (Emphasis added.) *Montana Media, Inc. v. Flathead County*, 2003 MT 23, ¶¶65-66, 314 Mont. 121, ¶¶65-66, 63 P.3d 1129, ¶¶65-66.

Under subsections (3) and (5), insurers may contact the treating physician without notice to claimant; assert facts and arguments to the physician without opportunity of the claimant to participate; ask only those questions that favor the insurers’ position; unilaterally determine what constitutes relevant healthcare information; refuse to inform the claimant of the facts and argument advocated to the physician; and deny, convert, or terminate benefits based upon whatever opinion the physician may render. Further, the process is devoid of “procedural safeguards” because the denial, conversion or termination of benefits based upon the physician’s opinion can occur before notice to claimant, or before claimant is

afforded any due process whatever. Thus, a claimant has no means by which to protect himself from “unreasonable, arbitrary or capricious action.”

2. Subsections (3) and (5) are not rationally related to their objective.

Presumably, the purpose of the legislation was to provide insurers with relevant healthcare information. However, the legislative history is silent on (1) why, 90 years after the enactment of the WCA, it suddenly became necessary to authorize private communications between insurers and treating physicians without notice to claimant, and (2) why the insurer’s access to relevant healthcare information was somehow deficient during the first 90 years of the WCA. In the absence of such legislative findings, the subsections are not rationally related to the permissible legislative objective.

Workers compensation benefits provide essential minimum income for the necessities of life. Subsection (3) of §39-71-604 and subsection (5) of §50-16-527 permit insurers to exclude claimants from participation in physician determinations used by insurers to deny, convert, or terminate essential benefits. There is no rational basis or legitimate legislative purpose for such exclusion. Therefore, subsection (3) of §39-71-604 and subsection (5) of §50-16-527 violate Claimants’ rights to due process and are unconstitutional. See *Hardy v. Progressive Specialty Insurance*, 2003 MT 85, ¶¶35-38, 315 Mont. 107, ¶¶35-38, 67 P.3d 892, ¶¶35-38

(held: cost savings to private insurers of an anti-stacking statute were not rationally related to the legislative objective of maintaining affordable insurance in Montana, and statute constituted an “arbitrary and capricious action”).

3. Post deprivation remedies do not satisfy due process.

Appellants argue that post-deprivation procedures (e.g. mediation and judicial review) satisfy due process. *State Br.*, pp. 19-20; *MSF Br.*, pp. 14-15; *Liberty Br.*, pp. 5-6. Such assertion is contrary to law. “Only under exigent circumstances, where the government’s interest requires immediate action, may a post deprivation, rather than a pre-deprivation hearing satisfy due process.” *Montana Media v. Flathead County*, ¶66, citing *Boddie v. Connecticut*, (1971) 401 U.S. 371; *Auxier v. Woodward State Hospital*, (1978 Iowa) 266 N.W.2d 139, cert. denied, 439 U.S. 930; *Baksalary*, *supra*

Baksalary, *supra*, is on point. In *Baksalary*, a Pennsylvania law permitted insurers to unilaterally terminate workers compensation benefits “forthwith” upon an affidavit from a physician averring that the claimant had recovered. Claimant was not entitled to notice “either before or after filing” the affidavit. *Id.*, at 221. As a result of the procedure (known as the “automatic supersedeas”), the claimant was automatically deprived of benefits between the time of the filing of the affidavit and until “a referee decides the case.” *Id.*, 221-222. The U.S. District Court held claimants had a sufficient property interest in the continued receipt of benefits to

support a due process challenge and determined the procedure was unconstitutional citing *Auxier, supra*; *Mathews v. Eldridge*, (1976) 424 U.S. 319; and *Goldberg v. Kelly*, (1970) 397 U.S. 254.

Circuit Judge Adams concurring opinion directly addresses the constitutional deficiencies of the statutes in the present case.

The second deficiency in the Pennsylvania arrangement is that it provides no independent check by state authorities on the termination certification by a physician. Thus a physician employed by an insurance carrier, to whom a disabled worker must periodically report, may at any point certify that the disability has ceased. As noted above, that certification alone immediately terminates benefits under the supersedeas provision. Although *Mathews* does not require a full evidentiary hearing, the Supreme Court has nevertheless observed, "[o]rdinarily, due process of law requires an opportunity for 'some kind of hearing' prior to the deprivation of a significant property interest." *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1, 19, 98 S.Ct. 1554, 1565, 56 L.Ed.2d 30 (1978). *See generally*, Friendly, *Some Kind of Hearing*, 123 U.Pa.L.Rev. 1267 (1975). We need not set forth the precise minimum safeguards that would protect a termination not accompanied by an evidentiary hearing. However, it bears comment that the technical, medical testimony that insured reliability in *Mathews* was followed by two tiers of independent state and federal agency review prior to termination of benefits. ***In short, the use of the unchecked recommendation of a physician in the employ of an interested party to terminate a benefit in which a recipient has a cognizable property interest is at odds with the due process concepts set forth in Mathews and Goldberg.***

Baksalary, 236-237 (emphasis added).

MSF and Liberty also cite *Williams Insulation v. Dept. of Labor and Industry*, 2003 MT 72, 314 Mont. 523, 67 P.3d 262, to argue that post-decision

review satisfies due process. *MSF Br.*, p. 8; *Liberty Br.*, p. 15. Williams waived its right to an evidentiary hearing and consented to submitting the case to the Department of Labor and Industry on briefs. It was not denied entitlements or benefits prior to full hearing before the Department of Labor and Industry. Thus, *Williams Insulation* is not on point.

The Supreme Court has previously addressed the inadequacy of post-deprivation review. See *Montana Media, supra*. In *Medicine Horse v. Big Horn County School District*, (1991) 251 Mont. 65, 823 P.2d 230, the Supreme Court rejected the argument that a hearing conducted after termination of Medicine Horses' employment satisfied due process. At that point, the decision that Medicine Horse should be terminated "had already been made without his presence or input." Thus, consideration of his value as an employee at a post-termination hearing "necessarily had to have been tainted by the board's concern for justifying its own action" and was constitutionally "inadequate." *Id.*, 236. Once a property interest is determined to exist, procedural due process mandates a hearing *before* the property interest is denied or terminated. *Cleveland Board of Education v. Loudermill*, (1985) 470 U.S. 532, 542; *Montana Media, Inc.*, ¶66-67.

As in *Medicine Horse*, a system which provides for the appeal or mediation of adverse decisions which have been unfairly made in the first place (because of

the lack of notice of or opportunity to participate in the initial decision making process) is fundamentally unfair since it places the burden on the claimant to overcome the presumptive effect of the adverse decision. In other words, it is coercive and gives the insurer unfair leverage in post-deprivation “procedures” to correct a decision made under a process which is fundamentally unfair.

4. *Appellants exaggerate the extent of due process that is required.*

State asserts that “due process does not require a court or lawyers to be present at every stage” of the decision making process. *State Br.*, p. 21. Similarly, MSF asserts that Claimants argument will “condemn the [decision making] process to adversarial proceedings before any decision could be made on a claim.” *MSF Br.*, p. 15. State and MSF exaggerate. Notice, opportunity to present facts and argument, and the right of cross-examination are some of the indices of “fairness.” However, due process does not require that all such indices be afforded at every stage of the process. At an early stage, perhaps only notice is required. At later stages, additional opportunity to present facts and arguments, and to cross-examine, may be required. It is not Claimants’ burden to determine what